IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 7

WILBURN BOAT CO., *et al.*,
Petitioners,

versus

FIREMAN'S FUND INSURANCE COMPANY,
Respondent.

BRIEF *AMICUS CURIAE* FILED ON BEHALF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS

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Introduction and Statement of Basic Question of Law Involved

The American Institute of Marine Underwriters is a non-profit, voluntary trade association of 139 marine insurance companies, duly admitted to transact such business in various States of the United States. The member companies are actively engaged in competing with one another and with marine insurers in foreign markets in affording marine coverage in all its varied aspects and most of them operate on a nation-wide scale. The Institute's basic purpose is to foster conditions conducive to a sound and adequate American marine insurance market, which various Congresses have declared to be necessary to "the development and maintenance of an adequate and well balanced American merchant marine,"[1] vital to this country's "na-

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[1] Merchant Marine Act of June 29, 1936 (49 Stat. 1985) and Amendments thereto; Act of June 29, 1940 (54 Stat. 689); Act of April 11, 1942 (56 Stat. 214).

tional defense and for the proper growth of its foreign and domestic commerce."[2]

The members of the Institute, therefore, have a definite interest in the decision of the basic question of constitutional law here presented, which is fundamental to the writing of marine insurance. That question may be summarized as follows:

> Can State statutes validly displace or modify well-settled principles of the uniform general maritime law (as recognized and adopted in this country) applicable in determining the substantive rights and liabilities of the parties created by maritime contracts consisting of policies of marine insurance?

This is a question quite apart from the right of the States to regulate and tax the business of insurance generally, with which it is confused in petitioners' brief in that they fail to differentiate between the regulation and taxation of the business activities of marine insurance companies and the substantive law relating to and determinative of contractual rights and liabilities created by maritime contracts. The member companies of the Institute make no claim that merely because they write marine insurance policies they are exempt from such regulation and taxation.[3]

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[2] Merchant Marine Act of June 5, 1920 (41 Stat. 988); and see "Report on Status of Marine Insurance in the United States" by Professor S. S. Huebner, approved by the House Merchant Marine and Fisheries Committee, 66th Congress, Feb. 26th, 1920, page 9.

[3] The companies writing marine insurance as a part of their general business have always been subject to regulation and taxation in respect to their business in general, and still are by virtue of the McCarran Act which protects such regulation and taxation from attack under the commerce clause of the

The effect of a decision on this broad question cannot be restricted to the particular set of facts in this specific case, but will obviously have application to every policy of marine insurance now or hereafter issued in the United States, including policies of all types of marine coverage on all manner of vessels, small or large, inland or sea-going, as well as on cargoes moving by water in inland, coastal, intercoastal and international trade. The fact that the particular vessel here involved was small and located at the time of her loss on an inland lake, cannot obscure the importance and scope of the basic question presented.

The decisions of the Courts below stand squarely on the proposition that the policy was of marine insurance and, as such, was a maritime contract, which requires that the respondent's liability be measured by the standards of the maritime law, according to which contracts of insurance must be enforced as written and all warranties therein complied with literally (R. 201-2). "There is and can be no doubt," the Court of Appeals said, "that this suit which challenges the validity and effect of the terms of a maritime contract does involve a characteristic feature of substantive admiralty law" (R. 205) which

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Constitution, despite the holding in *United States* v. *South-Eastern Underwriters*, 322 U. S. 533, that insurance is commerce. The assertion (Pet. Brf., p. 13) that insurance is not commerce is based on earlier cases, as were also the inconclusive statements with respect to federal regulation cited from the Congressional Record and from statements at Senate hearings on the District of Columbia Model Marine Insurance Act cited (Pet. Brf., p. 15, n. 9, and pp. 24-25). Congress could always have regulated marine insurance under the grant of judicial power over maritime matters, Const., Art. III, Sec. 2, and could certainly have passed such an act as the British Marine Insurance Act, 1906 (Pet. Brf., p. 23), which is merely declaratory of substantive rights under marine insurance policies. Its failure to do so leaves those rights subject to the general maritime law as judicially interpreted.

State law is not admissible to modify (R. 204). Aside from the fact that "it is the settled doctrine that a marine contract of insurance is 'derived from', is 'governed by', and is a 'part of' the general maritime law of the world" (R. 204), the Court found that the policy provisions "covered the operation of the vessel on navigable waters of the United States without as well as within the State of Texas" and that the waters of Lake Texoma are part of the navigable waters of the United States (R. 201-2), facts which are not challenged by the petitioners. Actually the policy also covered the vessel on her voyage from Greenville, Miss. via the Mississippi and Red Rivers to Lake Texoma on navigable waters of the United States passing through several states (R. 169). Consequently, there can be no distinction drawn in this case between the policy before the Court and any other policy of marine insurance.

Petitioners' counsel makes a serious error in stating that "the insurance on the 'Wanderer' comes within the inland marine classification" (Pet. Brf., Note 31, p. 26). Inland marine insurance is a technical classification of risks, not marine at all, to which the principles of marine insurance do not apply. See *Davis Yarn Co.* v. *Brooklyn Yarn Dye Co.*, 293 N. Y. 236, 247-8, opinion by Conway, *J.*, formerly Insurance Commissioner of the State of New York; also *Stecker* v. *American Home Fire Assur. Co.*, 299 N. Y. 1, 6. Art. 5.53 of the Texas Insurance Code specifically provides that the term "inland marine insurance" shall not "be deemed to include insurance of vessels or craft * * * or any other risk commonly insured under marine as distinguished from inland marine insurance policies".

It is, therefore, clear that a typical policy of marine insurance is here involved and that all marine insur-

ance contracts will be affected by the decision of this Court.

Under the present status of the law relating to marine insurance policies, marine coverage of all types is now readily available in the American market at reasonable rates in competition with the London and other foreign markets. Such competition is only possible because of the uniformity in effect given to policy terms and conditions under the general maritime law which is in substance the same in England as it is in this country. This Court has recognized the existence of special reasons for keeping the law of this country "in harmony with the marine insurance laws of England, the great field of this business". *Queen Insurance Co.* v. *Globe & Rutgers Ins. Co.*, 263 U. S. 487, 493. If marine underwriters in this country are to be subjected to increased and uncertain policy liabilities by the varying laws of the 48 states, necessarily leading to increased premiums, such competition on equal terms will no longer be possible and the American marine insurance market will be seriously weakened.

The fundamental issue here posed does not concern marine underwriters alone, but is of equal, if not greater, importance to the national economy as a whole, affecting all ship and cargo owners and through them the commerce of the nation. The intimate relationship and direct effect of the cost of marine insurance on commerce was recognized by this Court in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 19, where a Federal wartime stamp tax on marine insurance policies covering goods exported was held unconstitutional as imposing (p. 27) "as much a burden on exporting as if it were laid on the

charter parties, the bills of lading, or the goods themselves."

Not only will the expense of marine insurance in this country be increased,[4] since it is axiomatic that premiums must be adequate to cover increased and uncertain liabilities if insurance companies are to stay in business, but, as we shall show in Point I hereof, the readiness with which such insurance is presently available will be restricted.

The decisions of the Courts below are in accordance with well-settled authority. As long ago as 1815 Justice Story held in *De Lovio* v. *Boit,* F. C. 3776, that a policy of marine insurance is a maritime contract and a subject of the admiralty jurisdiction and the judicial power of the United States under the Constitutional grant of power in "all cases of admiralty and maritime jurisdiction" (Art. III, Sec. 2). In *Insurance Co.* v. *Dunham,* 78 U. S. 1 at page 35, this Court said that the learned and exhaustive opinion of Justice Story in that case "has never been answered", and adopted his views.

In *Aetna Ins. Co.* v. *Houston Oil & Transport Co.,* 49 F. (2d) 121 (5th Cir.), the Court held (p. 124) that a policy of marine insurance covering a vessel on navigable waters of the United States was "a maritime contract, and therefore governed by the general admiralty law and not by the law of Texas" and, accordingly, that Section 4931 of the Texas Revised Civil Statutes (now Texas Insurance Code, Art. 6.15) could not operate, in favor of the mortgagee

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[4] Petitioners seem to acknowledge at p. 11 of their brief that if their contentions as to the applicability and effect of the Texas Statutes upon the marine policy here involved were to be sustained, higher premiums for Texan assureds would necessarily result.

of the vessel, to obviate the effect under the general maritime law of a breach by the insured owner of a watchman warranty in a hull policy. This Court denied certiorari in that case—284 U. S. 628. A most recent re-affirmation of the legal principle that, by reason of the delegation of judicial power over cases of admiralty and maritime jurisdiction to the Federal Government under Art. III, Sec. 2, of the Constitution, the rights of the parties to a marine insurance contract are controlled by the Federal general maritime law and not that of the States is to be found in *Compania Maritima Astra, S. A.* v. *Archdale* (an action on a hull policy to recover for a constructive total loss by stranding), N. Y. Law Journal, June 28, 1954, p. 5 (not yet officially reported).

We shall discuss more fully under Point II hereof the long established principles of law and the decisions of this Court which fully support those propositions.

There can be no doubt that under established principles petitioners could have sued on this policy of marine insurance in admiralty. The Court of Appeals properly held that their rights must be measured by the standard of the maritime law even though the proceeding was instituted in a common law court (R. 202), *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384, and that, when so asserted, their substance is unchanged (R. 204).

The Court of Appeals correctly stated that the settled doctrine of the general maritime law that contracts of marine insurance will be enforced as written and that a warranty contained therein must be complied with literally (R. 202). See cases cited by the Court (R. 202, 3). We shall show under Point I that the writing of marine insurance, by virtue of the

nature of the subject matter, the relationship of the parties, and the basis on which premiums are fixed, is peculiarly dependent upon this doctrine and its uniform enforcement. If petitioners' contentions as to the application and effect of the Texas Statutes upon this policy are accepted, there will be a clear interference of the State Statutes with this settled doctrine of the general maritime law—a "hostile conflict" (R. 204).[5]

The Court of Appeals correctly disposed of petitioners' argument that the McCarran Act authorized State legislatures to control and modify the substantive rights of the parties under a maritime contract consisting of a marine insurance policy. It pointed out that that Act was passed only to meet the decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, holding that insurance is commerce and within the regulatory power of Congress under the commerce clause of the Constitution, and that the Act declares only that the business of insurance might still be subject to state regulation and taxation free from attack under the commerce clause. The Court further pointed out that admiralty and maritime law does not depend for its effect upon the power of Congress to regulate commerce (R. 205). It depends rather on the constitutional grant of judicial power to the United States over cases of admiralty and maritime jurisdiction which has been held to establish the general maritime law as federal law, uniform in its application and effect, and beyond the power of the States

[5] The Court of Appeals was obviously impressed with the "persuasive" and "vigorous" argument of respondent's counsel that "The Texas Statutes as construed by the Texas Courts have no application to the present situation" (R. 205), but chose to base its decision on the dominance of the maritime law in the determination of substantive rights under a maritime contract, whatever the State law might be.

to modify in its substantive and characteristic features. We shall discuss the McCarran Act under Point III and there demonstrate that it does not have the effect claimed by petitioners.

We shall further show under Point IV that respondent's right to have its liabilities under this maritime contract determined according to the general maritime law is a constitutional right of which it may not be deprived by the statute of any State.

POINT I

Marine insurance, because of the nature of its subject matter and the relationship of the parties, is dependent for rational and ready underwriting on the principles of the general maritime law developed by long years of experience safeguarding such underwriting and uniformly applied and, in particular, on the principle that contracts of marine insurance must be enforced as written.

The writing of marine insurance is peculiarly dependent upon the applicability and uniform enforcement of the principles of the general maritime law developed over centuries of experience, and is particularly dependent upon that principle of the general maritime law which formed the basis for the Court of Appeals decision that such "contracts of insurance must be enforced as written" (R. 202) which includes the proposition that "a warranty in a contract of insurance must be literally complied with" (R. 202-3).

Marine insurance is of ancient origin. Although England has grown to be the great field of marine

insurance underwriting, the insurance of vessels and cargoes against marine risks originated on the Continent,[6] probably in Italy in the 12th century. As Mr. Justice Bradley pointed out in *Insurance Co.* v. *Dunham*, 11 Wall. (78 U. S.) 1, at p. 31, the contract of marine insurance "sprang from the law maritime, and derives all its material rules and incidents therefrom".

The rules for the construction of maritime contracts of marine insurance of necessity differ materially from the law relating to other types of insurance. However, as pointed out by the learned author of Philipps on Insurance in Section 635, in many respects "the difference is not * * * so much one of doctrine as of the subject matter, and of the degree of confidence necessarily placed in the assured by the underwriter". These two factors, together with the known effect of long settled principles of the uniform maritime law presently governing the respective rights and liabilities existing between a marine insurer and his assured, are determinative of the premium rate charged in respect of whatever risks marine underwriters are asked to assume in each particular case. It is, in fact, the very existence, and uniform enforceability, of policy terms and conditions, including warranties designed to limit and define the risks, physicial and moral, which are under-

[6] In *Croudson* v. *Leonard*, 4 Cranch (8 U. S.) 434 (a marine insurance case), it was noted at p. 435 that "policies of insurance are known to have been brought into England from a country that acknowledged the civil law". The earliest (1613) extant English policy almost exactly resembles the form given in "Le Guidon de la Mer", published in France in 1600, and for the most part is in accord with the Lloyd's form now in use. Martin's "History of Lloyds and Marine Insurance", p. 46.

taken, that make the ready writing of marine insurance practicable.

Marine insurance is unique in its subject matter, in the causes and risks of loss to which the subject matter is exposed, and in the relationship of the parties. The subjects of marine insurance, and the interests therein to be insured, are so different, the risks and causes of loss so varied, and the types and conditions of insurance available so manifold, that the writing of marine insurance is unique. Unlike fire and other types of insurance, no State or regulatory body has attempted to establish uniform policy conditions or rates in respect of marine insurance.[7] Each contract of marine insurance is a matter of individual negotiation. The type, conditions and limits of the insurance written varies with the nature of the property insured, each requiring peculiar limitations and safeguards. The conditions of the insurance written depend upon the peculiar requirements of the individ-

[7] In the marine field, rates are set by the individual underwriter, not by Rating Bureaus. The State legislatures have recognized the complexities inherent in the problem and the need for freedom of contract by refraining from requiring the filing of marine rate schedules with, and for approval by, State Insurance Commissioners as is prescribed in virtually every other field. See "*Richards on Insurance*" (5th ed.), Secs. 22, 52. This is true of Texas (see Art. 5.53 of Vernon's Texas Insurance Code), as well as of the District of Columbia Model Marine Insurance Code. Moreover, the model "Fire, Marine and Inland Marine Rate Regulatory Bill" (Appendix P of "Richards on Insurance" (5th ed.), approved by the National Association of Insurance Commissioners on June 12, 1946, and subsequently adopted by nearly every State (Richards, Sec. 52), in Sec. 2(a) thereof specifically excepts from its rate requirements "insurance of vessels or craft, their cargoes • • • or other risks commonly insured under marine, as distinguished from inland marine, insurance policies." Please note the respective definitions of "marine insurance" and of "inland marine insurance" set forth in Art. 5.53 of the Texas Insurance Code.

ual assured and are frequently determined by the consideration of what he is willing to pay for.

The vessels involved may be yachts, excursion boats, river steamers, coastwise vessels, tramps, liners, fleets, dredges, fishing vessels, barges, tankers, cargo, passenger or other vessels, employed in limited inland waters, or extensively across the seas, in various trades or employments or uses. Special considerations and necessary limitations are applicable to each type.

The cargoes may be small or large, individual shipments or full ship loads, manufactured or raw materials, grain, ores, chemicals, etc., in bulk or packaged. They may be dangerous in themselves or when stowed with other cargoes. Some may require special packaging or treatment before or during shipment. The conditions and limitations of insurance thereon and the premiums charged are directly related to such factors.

The insurance may be hull, cargo, freight, disbursements, increased value, voyage policies, time policies, open policies, total loss only, with average, or free of particular average, with or without war risks, with or without liability insurance, and may include a collision (liability) clause, or towers liability clause, or other special clauses.

The varied and peculiar risks or causes of loss to which vessels, cargoes, and other interests insured may be subject are partially represented by the various perils enumerated in the perils clause of the instant policy among which fire is normally included (R. 173, 2nd Par.).

In addition to risks of physical loss, the interests covered by marine policies may be subject to special liability and loss arising out of the peculiar principles of the maritime law, such as for salvage, general average, bottomry, respondentia, etc..

Of necessity, every policy of marine insurance is tailormade to meet the requirements, desires or capacity of the individual assured. It is usually written on a basic form using traditional and well understood language, but such insurance is added to, or limited by, riders or endorsements affixed to the policy, many of which are more or less standard, but many of which are also specially drawn or adapted to fit the individual case.

In order to define and limit the nature and quality of the risks undertaken so that premiums can be rationally fixed, conditions and warranties are included in, or attached to, the policy form. Most of the customary hull and cargo policy forms, including policy forms or clauses suggested by the American Institute of Marine Underwriters and by the Institute of London Underwriters, contain specific and standardized warranties. Without such warranties and conditions, and the assurance that their integrity will be respected and preserved, premiums cannot be intelligently fixed and the writing of marine insurance would become a gamble rather than a business.

Examples of warranties frequently used to limit risks are those confining the operations of vessels to specific waters, or trades, or uses. The warranty that the yacht "Wanderer" would be "used solely for private pleasure purposes" (R. 173) was such a warranty commonly used in yacht policies, intended to

confine the vessel to the normal uses of a yacht owner on the theory that the risks, both physical and moral, would be increased if the vessel were used, or privileged to be used, for commercial ventures. Whether this warranty is as important as the warranty limiting the waters in which she might be used (R. 169) is beside the point. Both are basic in determining the risk undertaken by the underwriter and the premium charged. If the effect of one is nullified unless the underwriter can show that the breach contributed to the destruction of the property, so is any other, and all fixed limits of insurance are thereby voided.

In Petitioners' Brief, page 21, the statement is made that "we are not dealing here with the construction of * * * a marine watchman clause * * *" such as was dealt with by the Court in *Aetna Insurance Co.* v. *Houston Oil & Transport Co.* (C. A. 5), 49 F. (2d) 121, cert. den. 284 U. S. 628, the inference perhaps being that such a clause may continue to be dealt with under the general maritime law although the effect of the "use" warranty may be avoided in the present case. There is, however, no suggestion by the petitioners as to why this principle should be applicable to one warranty but not the other and we submit there is none. If Article 6.14 is competent to modify the effect of one warranty in a marine insurance policy, it is equally competent to modify any other, express or implied.

The relationship of the parties in marine insurance is also unique. Due to the transient nature of the property insured, the extraordinary perils to which it may be subject in operation or movement, the fact that the circumstances of its operation or movement

cannot be as adequately known or overseen as in the case of fixed property, the underwriter is peculiarly at the mercy of the integrity and good faith of the assured. As a result, there have been developed in the general maritime law for the protection of the underwriter as a result of long experience certain principles and implied warranties peculiar to marine insurance. The principle of *uberissima fides* applies, requiring disclosure by the assured to the underwriter, although no inquiry be made, of every fact material to the risk within the former's knowledge. *Stecker* v. *American Home Fire Assur. Co.*, 299 N. Y. 1, 6. See also *Clarkson* v. *Western Assur. Co.*, 33 App. Div. (N. Y.), 23, 28-30; and the discussion of the moral hazards in marine underwriting set forth at pp. 95, 242-3 of *"Winter on Marine Insurance"* (2nd Ed.).

Examples of warranties implied by the general maritime law as adopted in this country in marine insurance contracts are the warranty of seaworthiness at the attachment of the risk or the beginning of the voyage, warranty of no deviation, warranty of no change of voyage, warranty of legality, warranty of neutrality, warranty against delay in sailing, warranty against unreasonable delay on the voyage, etc.. All of these implied warranties limiting the risks undertaken by the insurer may be rendered of substantially no effect if Art. 6.14 Texas Insurance Code is held validly applicable to policies of marine insurance.

It is only because of the existence of such principles of the general maritime law and the assurance that conditions and warranties written into the policy will be respected and enforced that insurance in this complicated field can be written with the readiness and

facility required by vessel owners and those engaged in commerce. Because of the existence of these safeguards, marine insurance can be obtained readily from underwriters, as it was in this case, in spite of sketchy knowledge available to them concerning the parties or the property to be insured.

Destruction or modification of these principles by varying state laws will destroy the facility with which the marine insurance business is carried on,—to the inconvenience and expense of vessel and property owners requiring such insurance. Marine underwriters, faced with such conditions, must hesitate and investigate before granting insurance, and they must charge higher premiums for uncertain or increased liabilities, since it is axiomatic that premiums must cover liabilities, expenses, and some profit, if insurance companies are to remain in business.

Aggravation of such conditions will especially ensue if force and effect is given to such State enactments as Art. 21.42 of the Texas Insurance Code (Pet. Brf., p. 4) purporting to subject to Texas laws any contract of insurance "payable to a citizen or inhabitant of the state", regardless of where the policy was written or issued or where the assured then resided. Owners of vessels or cargo may change their residence after the policy is issued and, in the case of corporations, some may be considered as an "inhabitant" of more than one state. An underwriter may therefore be unable to know in advance the State whose laws will determine his liability under his policy.

The application of State statutes such as Art. 21.42 would have particularly serious repercussions in respect of open cargo policies. Such open policies cover

all shipments made during a specified period of time by the party to whom the open policy is issued and grant to such party authority to issue and countersign on behalf of the insurer certificates of insurance to cover each individual shipment made by him during the life of the policy for account of whom it may concern. Such certificates take the place of a policy in respect of the cargo described therein and afford the basis for an action by the holder for value. As was pointed out in *Thames & Mersey Ins. Co.* v. *U. S.*, 237 U. S. 19, 23, and 26, these certificates of insurance become one of the required shipping documents in any C. I. F. sale of the goods. They thus change hands frequently during transit of the shipment and the period of coverage. In other words, a marine insurer who issues an open cargo policy has no means of knowing at the time of its issuance who the ultimate assureds, as holders for value of the various insurance certificates to be issued thereunder, will be, nor in what State they will turn out to reside.

In short, if State statutes should be held to displace settled rules of the general maritime law in respect of contracts of marine insurance, the foregoing demonstrates the utter impossibility of a marine insurer being able to estimate the nature and extent of his liability in case of loss. A proper estimate thereof is, however, necessary in order to permit the underwriter to set a proper premium. As the Court said in *Williams* v. *Ins. Co.*, 245 App. Div. 585 (N. Y.), at p. 586: "The premium * * * was fixed by their contract with the insurer; its amount depended upon the risk to be assumed by the insurer." See also, *inter alia*, *Md. Ins. Co.* v. *LeRoy*, 7 Cranch (11 U. S.) 26, at p. 30, and "*Winter on Marine Insurance*", 2nd Ed., p. 99 and p. 174.

The existence of the various factors above outlined which are peculiar to marine insurance, and the direct and intimate relationship of marine policies to our foreign as well as to our domestic commerce, have led this and other Courts to stress from the earliest days the importance and need "in the uniformity of the application of rules to it", to use Mr. Justice Story's words in *Peters* v. *Warren Ins. Co.*, 14 Pet. (39 U. S.) 99, at p. 109, an action on a hull policy. Or as Mr. Justice Peters said in *Thurston* v. *Koch*, 4 Dall. (4 U. S.) 348 (a case involving double insurance of goods on the brigantine "Nancy"), at p. 352:

> "To be respectable abroad, and to facilitate and simplify mercantile business at home, we should have a national, uniform and generally received law-merchant. The custom or practice of one state, differing, perhaps, from that of another, must yield to general and established principles."

This necessity for uniformity was also the basis of the recognition by this Court in *Queen Ins. Co.* v. *Globe & Rutgers Ins. Co.*, 263 U. S. 487, 493, that the law of this country relating to marine insurance should be kept in harmony with that of England, the great field of this business. Petitioners' contentions, if sustained, would not only result in complete abandonment of that objective, but would destroy uniformity of the prevailing maritime law in this country by making the construction of the contractual relationships under policies of marine insurance subject to the varying statutory law of forty-eight States.

Numerous cases have also stressed the dangers inherent in changing a settled construction of standard provisions in marine insurance policies. See, *inter*

alia, *Hale* v. *Washington Ins. Co.*, 11 Fed. Cases 189, 192; *Dickey* v. *Baltimore Ins. Co.*, 7 Cranch (11 U. S) 327, 331; *Olivera* v. *Union Ins. Co.*, 3 Wheat. (16 U. S.) 183, 190; *Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, at p. 493; *Lehigh etc. Coal Co.* v. *G. & R. Fire Ins. Co.*, 6 F. (2d) 736 (2 Cir.), 738-9.

Marine insurance is for all these reasons dependent for rational and ready underwriting upon the uniform application and uniform enforcement of established principles of the general maritime law giving to the provisions of the contract their full effect and traditional meaning. The contracts are individually negotiated and are always subject to limitations express and implied. There is full freedom of contract on both sides. There is, therefore, no injustice in requiring the assured to live up to his part of the bargain and in enforcing the limiting conditions which form the bases on which the insurance is written and the premium fixed.

POINT II

The grant in Art. III of the Federal Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction makes invalid any State statute in so far as the same operates to displace or substantially modify the settled general maritime law applicable in maritime cases to the determination of substantive rights rooted in that law. The present case involves such rights.

The overlapping nature and similarities of the subject-matter affected by Art. I, Sec. 8, and by Art. III,

Sec. 2, of the Constitution have at times tended to obscure the fundamental difference between those two separate and wholly distinct grants. The former merely gave Congress power to enact such laws as it might deem necessary "to regulate commerce with foreign Nations and among the several States". Until Congress legislated on a national basis and to the extent that it did not fully occupy the field, State law was unaffected. Art. III, Sec. 2, on the other hand, deals with the judicial power of the United States and extends such judicial power "to all cases of admiralty and maritime jurisdiction". The *Belfast*, 7 Wall. (74 U. S.) 624, is an early example of the fact that this judicial power operates in respect of maritime contracts of a wholly intrastate nature. Thus, it may be said that Sec. 8 of Art. I provides for permissive uniformity in the field of non-maritime interstate and foreign commerce, whereas Sec. 2 of Art. III specifies a mandatory uniformity in matters involving, and directly affecting, maritime commerce generally.

An example of confused thinking in respect of those two separate grants is afforded by the fact that pilotage cases such as *Cooley* v. *Board of Wardens*, 12 How. (53 U. S.) 299 (Pet. Brf., p. 17), and *Ex parte McNeil*, 13 Wall. (80 U. S.) 236, are sometimes cited in connection with questions of maritime law embraced by Art. III, Sec. 2, whereas the regulation of pilotage is not the exercise of Federal maritime judicial power, but falls solely under Art. I, Sec. 8, as is shown in *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 195. Similarly, the facts and points of law involved in *Hooper* v. *California*, 155 U. S. 648, cited so many times in petitioners' brief, and its companion case (*Nutting* v. *Massachusetts*, 183 U. S. 553), clearly

show that they relate solely to commerce, *i. e.*, to Art. I, Sec. 8, rather than to the general maritime law, yet they too have sometimes been confused with, (as the petitioners do herein) and referred to as involving, constitutional issues raised by Art. III, Sec. 2. We shall discuss those two cases in greater detail at pp. 35-36, *infra*. See also *Allgeyer* v. *Louisiana*, 165 U. S. 578.

The distinction between the nature and scope of these two Constitutional grants has also tended to become obscured in certain classes of cases by the fact that Congress, in implementing the grant of exclusive Federal judicial power over all maritime causes of action by its enactment of a Federal Judicial Code, provided for concurrent jurisdiction of common-law courts over those types of maritime cases where the common law practice affords a competent remedy for the enforcement of the rights created by the general maritime law. The existence of this limited concurrent jurisdiction has frequently resulted in confusion of analysis, despite the fact that Congress carefully specified that only "the right of a common-law remedy" was saved to suitors in maritime matters. However, this Court has consistently recognized this restriction in the "saving clause". An early example is *The Moses Taylor*, 4 Wall. (71 U. S.) 411, which involved a maritime contract for transportation by sea.

Many other decisions by this Court have also been based on the recognition of that restriction and have held that the "saving clause" does not permit substantial modification of settled substantive maritime law by State statutes or, as stated in *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, at p. 384, "give the complaining party an election to determine

whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law". The saving clause does not permit "attempted changes by the States in the substantive admiralty law". *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 123-4. See also *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245; *Madruga* v. *Superior Court*, 346 U. S. 556, 561.

Since policies of marine insurance constitute contracts between a marine insurer and his assured, the remedy available at common law for the enforcement of contractual rights is particularly "competent" in respect of actions on such policies. Nevertheless, the State courts, as well as this Court, have invariably recognized the application thereto of a "marine rule" as distinguished from "ordinary rules" applicable to other types of insurance contracts. See, for example, *Stecker* v. *American Home Fire Assur. Co.*, 299 N. Y. 1, at pp. 6-7; *Blair* v. *Nat. Security Ins. Co.*, 126 F. (2d) 955, at p. 957 (3rd Cir.); and the cases therein respectively collected.

Moreover, the incontrovertible facts of history concerning the origin of marine insurance and the development of the law relating thereto establish that, as was said by the learned authors of "Benedict on Admiralty", "it is, indeed, of all contracts, the most purely maritime" (Sec. 213, 4th edition). In his scholarly opinion in *DeLovio* v. *Boit*, (1815) Fed. Cases No. 3776, Mr. Justice Story, after a review of the historical antecedents, pointed out that "all civilians and jurists agree" that policies of marine insurance "are properly to be deemed 'maritime contracts'" (p. 444). While it is true that it was not until 1870 (*Ins. Co.* v. *Dunham*, 11 Wall. (78 U. S.) 1)

that this Court ruled on the question whether the constitutional grant to the United States of jurisdiction over admiralty and maritime matters extended to cases involving marine insurance policies, it is to be noted that as early as 1808 Mr. Justice Johnson in *Croudson* v. *Leonard*, 4 Cranch (8 U. S.) 434 (an action on a hull policy), pointed out at p. 435 that marine insurance was "brought into England from a country that acknowledged the civil law" and that "this must have been the law of the policies". It is also the fact that, prior to 1870, there were various cases other than *DeLovio* v. *Boit, supra*, specifically holding that marine insurance policies are maritime contracts and thus are within American admiralty and maritime jurisdiction,[8] and not a single recorded decision in denial of their essentially maritime nature. Likewise, we know of no decision subsequent to 1870 holding that marine insurance policies are not maritime contracts, whereas there are many cases in both State and Federal courts in which their maritime nature has been acknowledged. One of the latest is *Companhia Maritima Astra S. A.* v. *Archdale*, N. Y. Law Journal, June 28, 1954, p. 5 (not yet officially reported).

In *Ins. Co.* v. *Dunham*, *supra*, after a review and reaffirmation (pp. 24-29 of 11 Wall.) of the rulings of this Court that maritime contracts, including *in personam* actions thereon, fall within a proper interpretation of the Constitutional grant as to admiralty and maritime jurisdiction and that in this country the jurisdictional criterion in respect of contracts was not the place where they were made, but their subject-matter, Mr. Justice Bradley, addressing himself to

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[8] *Peele* v. *Merchants Ins. Co.*, (1822) Fed. Case No. 10,905; *Hale* v. *Washington Ins. Co.*, (1842) Fed. Case No. 5916; *Gloucester Ins. Co.* v. *Younger*, (1855) Fed. Case No. 5487.

this latter aspect, stated at page 31 that "it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom." He went on to point out (p. 32) "that the contract of marine insurance is an exotic in the common law; * * * It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians" and (p. 34) that "it is, in fact, a part of the general maritime law of the world; * * *".

Since it is clear from the foregoing that the substantive rights and liabilities existing under a contract of marine insurance rest upon the long-settled rules of maritime law, it follows that the basic question in the case at bar falls within, and is determined by, the fundamental principle upon which the majority of this Court based their decision in *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406. In that case, in overruling the contention there made "that Hawn's rights must be determined by the law of Pennsylvania" since Hawn "was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law," the majority of this Court stressed that (p. 409) "his right of recovery * * * is rooted in federal maritime law" and, on that basis, held (pp. 409-410):

> "Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been fre-

quently declared and we adhere to them. See *e. g., Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-246, and cases there cited."

It follows that since it is established that a marine insurance policy is a maritime contract whose meaning and effect are derived from and controlled by the general maritime law, a State cannot, under the settled principles reiterated in the *Hawn* case, *supra*, "deprive a party of any substantial admiralty rights" thereunder, or modify the dominant substantive maritime law governing the rights and liabilities of the parties thereto.

In the *Hawn* case this Court specifically exposed (pp. 410-411) the fallacy of the contention that this Court's ruling in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, requires the application of State law to a maritime cause of action if the concurrent jurisdiction of a common law Court is invoked. As there pointed out, the substantive law applicable in maritime matters is "not to be determined differently whether his case is labelled 'law side' or 'admiralty side' on a district court's docket" (p. 411 of 346 U. S.).

In short, the several fundamental principles reaffirmed and applied by the decision of the *Hawn* case dispose of the petitioners' major contentions in the case at bar and require an affirmance of the decisions of the lower Courts herein. Accordingly, it is not necessary to review the many earlier decisions of this Court. Because they are especially apposite, we wish, however, to direct particular attention to *Watts* v. *Camors*, 115 U. S. 353, and *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

The *Watts* case involved (p. 353) a "charter-party, made and concluded upon in * * * New Orleans", containing a provision for payment of the estimated amount of freight in case of a breach by the charterer. As noted by the Court, such a clause, contrary to the admiralty rule, was sanctioned by the Louisiana Civil Code and the Louisiana Courts strictly enforce such a contract term. This Court sustained the charterer's contention (p. 359) "that being a maritime contract, its construction was not affected by the local law of Louisiana". The *Watts* case was cited by this Court in *Union Fish Co.* v. *Erickson*, 248 U. S. 308 (1919), as one of its authorities for there overruling respondent's contention that the contract in that case was rendered invalid by Sec. 1624 of the California Civil Code, *i. e.*, by the *lex loci contractus*, and specifically holding (p. 313) that the general maritime law was controlling.

In the *Phenix Ins. Co.* case, *supra*, an action on an ocean bill of lading issued in New York, it was held (p. 443 of 129 U. S.) that State law, even though it was the *lex loci contractus*, was not binding and that the contractual rights were to be determined solely by the general maritime law as adopted in this country. At p. 30 of the *Dunham* case (11 Wall.), Mr. Justice Bradley pointed out the close analogy existing between maritime contracts of affreightment and contracts of marine insurance.

We should also refer to two decisions of this Court in the current year; namely *Madruga* v. *Superior Court*, 346 U. S. 556, and *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409.

In the *Madruga* case, which was a State court action in a vessel's home port for its sale and for the parti-

tion of the proceeds among its owners pursuant to a California statute, the majority of this Court there ruled that neither the settled rules of general maritime law nor any reasons requiring national uniformity in such type of case made the admiralty jurisdiction exclusive and that it was, therefore, under such circumstances competent under the "saving clause" of the Judicial Code for the State court to exercise concurrent jurisdiction *in personam* in (p. 563) "these essentially local disputes" between co-owners of a vessel. In other words, no rights and liabilities under an essentially maritime contract were there involved. It was stated, however, at page 561 that if there were "a national admiralty rule", *i. e.*, settled substantive maritime law on the subject, it "would bind the California court here, even though it has concurrent jurisdiction to grant partition".

The principles involved in that case are similar to those underlying the decision of this Court in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (1924). The essence of that decision was that, in implementing the concurrent jurisdiction of State Courts permitted by the "saving clause" in the Judicial Code, the State of New York (p. 124) "had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, * * * in a contract made in New York and which, by its terms, is to be performed there". In the very same paragraph, Mr. Justice Brandeis also ruled that "the 'right of a common law remedy', so saved to suitors, *does not* * * * include attempted changes by the States in the substantive admiralty law"; and he went on to distinguish the

principles underlying the *Jensen* line of cases by stating (p. 124):

> "This state statute is wholly unlike those which have recently been held invalid by this Court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt * * * to modify the substantive maritime law * * *."

On the contrary, in the case at bar the petitioners seek to have the settled substantive rules of the general maritime law applicable to a maritime contract consisting of a policy of marine insurance displaced or materially modified by State statutes relating to insurance in general.

In *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, this Court considered only (1) whether the McCarran Act is relevant to State legislation conflicting with the federal maritime law and (2) whether the operation of the Louisiana direct action statute conflicted with the comprehensive legislative system for adjudicating maritime claims set forth in the Federal Limitation of Liability Act. The principles of maritime and constitutional law and the construction of the McCarran Act set forth in the prevailing opinion of this Court in the *Cushing* case are wholly applicable to the fundamental issue in the case at bar and conclusively dispose of the several contentions made by the petitioners herein that State statutes can materially alter the law of marine insurance long established by well-settled rules of the general maritime law as adopted in this country. In fact, those rulings apply even more pertinently and with greater force in the

case at bar where substantive rights under a maritime contract are involved as distinguished from the ultimate question in the *Cushing* case as to the availability of procedural remedies afforded third parties by a State "direct action" statute. The position taken in Mr. Justice Clark's concurring opinion seems to be based on such a distinction.

The dissent in the *Cushing* case was based on several grounds, one of which was the scope, nature and purpose of the Limited Liability Act. Obviously, those factors are not involved in the case at bar. Another ground involved the construction to be given to the McCarran Act in connection with construing (p. 437) "federal statutes such as the Limited Liability Act" in relation to (p. 437) "a state law like Louisiana's", described a few pages before as one which (p. 431) "would further the equitable aims of admiralty by providing relief not otherwise available for maritime wrongs" for the benefit of seamen, who (p. 438) "have traditionally been the wards of admiralty", and the application of which (p. 438) "under the circumstances here is also in harmony with the humane policy of the maritime law". In the case at bar, not only are these latter considerations not present, but also there is not presented any question as to any Act of Congress which does not "specifically relate(s) to the business of insurance" being "construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance" (Sec. 2(b) of the McCarran Act—*15 U. S. C., Sec. 1012(b)*).

As stated by Mr. Justice Black, it is (p. 436) "unquestionably true * * * the McCarran Act was passed in response to this Court's decision that insurance

was subject to the federal commerce power". Thus, the McCarran Act was enacted by Congress in exercise of the powers vested in it under the Commerce Clause, Art. I, Sec. 8, of the Constitution. The issue of constitutional law raised in the case at bar, however, has no relation to the Commerce Clause, but arises under Sec. 2 of Art. III, which grants to the United States exclusive judicial power over maritime matters. In referring to that aspect, the dissent took the view with respect to the remedy afforded by a "direct action" statute, that (p. 431) "to enforce the Louisiana law would not impair the uniformity of maritime law, but would once again 'illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court * * *' *Workman* v. *New York City,* 179 U. S. 552, 563".

In the instant case, however, it is not a question of a State statute supplementing maritime rights and the powers of admiralty courts in the uniform administration of equitable justice, but an attempt to have the varying local statutes of the States supplant the settled rules of maritime law governing substantive rights under a maritime contract based on that law. In other words, the case at bar comes within the constitutional limitation upon State power imposed by the Admiralty Clause and so clearly stated by Mr. Justice Brandeis in the *Red Cross Line* case, *supra* (to which reference was made by Mr. Justice Black at p. 429), *i. e.,* it is an instance where (p. 429 of 347 U. S.) "a state attempts to modify or displace essential features of the substantive maritime law". In short, the various grounds of dissent stated in the *Cushing* case are not applicable to the basic question of law in the case at bar.

We submit, therefore, that the State statutes of Texas relied upon by the petitioner cannot modify the substantive rights of the parties to the policy of marine insurance in this case which is a maritime contract. Those rights are derived from, and solely determinable by, the general maritime law of the United States.

POINT III

The McCarran Act does not, and was not intended to have, the effect of authorizing State statutes relating to insurance to alter or supercede our general maritime law in the determination of the substantive rights of the parties to a contract of marine insurance or to validate State statutes contravening any provision of the Constitution other than the commerce clause.

As the Court of Appeals correctly held (R. 205), the McCarran Act has "no application here". Petitioners' injection of that Act into this case involves two fallacies. First, they confuse the basic question as to what law is applicable in determining substantive rights created by maritime contracts consisting of marine insurance policies with the question of the regulation of *business* activities of marine insurance companies (including marine insurers) carried on within a State. Secondly, they misconceive and misinterpret the purpose, scope and effect of the Act. Among other things in this connection, they seem to believe that the Act has completely abrogated this Court's ruling in *U. S.* v. *South-Eastern Underwriters Assn., et al.*, 322 U. S. 533, that insurance is interstate commerce (see their subheading on p. 13)

whereas, in fact, the Act fully adopts[9], and could not constitutionally have been enacted except on the basis of, that ruling.

All agree that the McCarran Act was passed to meet the situation created by the decision of this Court in the *S. E. U.* case, *supra*. In that case the question was whether certain business practices on the part of some 200 fire insurance companies operating in six Southern States (which would constitute violations of the Sherman Act if committed by other type businesses engaged in interstate commerce) were subject to the anti-trust laws enacted by Congress under the Commerce Clause of the Federal Constitution. In holding that they were so subject, this Court ruled that the business of insurance is interstate commerce within the meaning of that Clause. To clarify the situation created by that recognition of insurance as commerce and the interstate characteristics of the insurance business generally, and to prevent State statutes taxing and regulating the activities of those insurance companies which do business in more than one State from becoming subject to attack on the constitutional ground that they restrain, or impose undue burdens on, interstate commerce, the 79th Congress enacted Public Law 15, approved March 9th, 1945, known as the McCarran Act (15 U. S. Code Secs. 1011-1015).

Sec. 1 of that Act declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest". Aside from the moratorium provision (Sec. 3(a), which is not involved here), the essence of the rest of the Act

[9] See in particular Sec. 3(b) and Sec. 4 and the proviso in Sec. 2(b).

is that, with certain specific exceptions,[10] "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business" and that the Federal anti-trust laws are applicable only "to the extent that such business is not regulated by State law". Thus, both the cause for its enactment and the phraseology of the Act itself—including the provision in Sec. 3(a) for a moratorium in respect of the various Federal anti-trust laws until the States could legislate in that field—would seem to make it clear that Congress merely sought to sanction the continuation of existing State systems for the regulation of business practices of, and the taxation of, the insurance business generally rather than to give the States any new and greater powers than they had possessed prior to the *S. E. U.* decision of this Court.

The House Report on the Bill as enacted explicitly stated:

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-Eastern Underwriters Association* case." H. R. Rep. No. 143, 79th Cong., 1st Sess., p. 3.

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[10] The only one of such exceptions having any relevancy here is the provision in Sec. 4 that "nothing contained in this Act shall be construed to affect the application to the business of insurance of * * * The Merchant Marine Act, 1920". The reference, it is to be noted, is to the whole Act, not merely to Sec. 29 thereof. The 1920 Act (46 U. S. Code Sec. 861, *et seq.*) declared the public policy of Congress to foster a well-balanced American merchant marine and to that end contained a provision (Sec. 29) designed, after extensive investigation and hearings, to place marine insurance companies in the American market in a position to compete advantageously with marine insurers abroad.

As to the validating effects of the McCarran Act on State Legislation in the insurance field, this Court in *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946), recognized that that Act is not effective to validate State legislation in contravention of other constitutional provisions than the Commerce Clause. Thus, at p. 430, it was pointed out that it is not

> "necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of legislation must have lain some provisions which may have been subject to serious question on the score of other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress' power. And we agree with Prudential that there can be no inference that Congress intended to circumvent constitutional limitations upon its own power.
>
> But, though Congress had no purpose to validate unconstitutional provisions of state laws, except in so far as the Constitution itself gives Congress the power to do this by removing obstacles to state action arising from its own action or by consenting to such laws, H. Rep. No. 143, 79th Cong., 1st Sess., p. 3, it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for."

Since, as pointed out by this Court, the McCarran Act was passed only to sustain existing and future State legislation relating to insurance from attack

under the Commerce Clause and not to validate State legislation in contravention of other constitutional provisions, that Act obviously gives no support to the validity of the Texas statutes relied upon by the petitioners which we have shown under Point II to be unconstitutional as an invasion of substantive principles of the general maritime law existing by virtue of the grant of judicial power to the United States over cases of admiralty and maritime jurisdiction in Art. 3, Sec. 2, of the Constitution.

Interwoven with petitioners' contentions as to the effect of the McCarran Act is their repeated reliance on *Hooper* v. *California,* 155 U. S. 648 (cited at pp. 14, 15, 17, 23, 25 and 29 of their brief). It would seem, however, that they have misread, and misinterpreted the rule and effect of, that decision, and that, for several reasons, the Court of Appeals was clearly right when, in its opinion herein, it stated that "the *Hooper* case and the McCarran Act have no application here, and, if more need be said, the *Hooper* case does not involve a conflict between State law and the law of admiralty and cannot aid appellants even if, as they contend, it has been revived by the McCarran Act" (R. 205-6).

Even aside from the fact that the *Hooper* case, *supra,* was decided half a century before the *S. E. U.* case (322 U. S. 533) ruling and at a time when it was considered to be well settled that insurance was not interstate commerce, a consideration of the material facts and actual decisions in the *Hooper* case and also in the companion and the virtually identical case of *Nutting* v. *Massachusetts,* 183 U. S. 553 (which is also cited by petitioners herein), will show that, in both instances, it was merely held that a State penal statute,

making it a misdemeanor for an insurance broker, resident in the State, to procure or agree "to procure any insurance for a resident of this State from any insurance company not incorporated under the laws of the State", or duly admitted to do business therein, is a valid regulation of insurance brokerage business conducted within the State by a resident broker thereof and that such action by an insurance broker is not subject to an implied exemption in cases where the broker's agreement with the assured is to procure marine insurance[11] rather than some other type of policy. In neither opinion is there a single line with reference to the validity of the marine insurance policy thus obtained by the assured nor as to State statutes being applicable to the maritime contract evidenced by the policy of marine insurance nor as to their governing the substantive rights and liabilities of a resident assured and a foreign marine insurer. Neither the arguments of counsel nor this Court's opinion in either of those cases contain any reference to Art. III of the Constitution.

Thus, even conceding, *arguendo,* petitioners' companion contention at pp. 28-29 of their brief that the effect of the McCarran Act (15 U. S. C., Sec. 1011) is to make the legal situation the same as if this Court

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[11] A contract to procure marine insurance is non-maritime in its nature; and an action thereon thus is wholly outside the scope of admiralty and maritime jurisdiction referred to in both Art. III, Sec. 2, and the implementing section of the Judicial Code (28 U. S. Code, Sec. 1331). See, *inter alia, Va.-Car. Chemical Co.* v. *Chesapeake Lighterage Co.*, 279 Fed. 684, 686 (2nd Cir.); *United etc. Co.* v. *N. Y. & Balt. etc. Line*, 185 Fed. 386, 390 (2nd Cir.); *Marquardt* v. *French*, 53 Fed. 630 (S. D. N. Y.). Our admiralty courts have no jurisdiction thereof even when it is incident to a contract otherwise strictly maritime, such as a bill of lading or a charter party. *Royster* v. *Hedger*, 48 F. (2d) 86, 87 (2nd Cir.); *Osterhoudt* v. *Hedger Transp. Co.*, 54 F. (2d) 282, 284 (2nd Cir.).

in the *South-Eastern Underwriters* case (322 U. S. 533) had not ruled the *business* of insurance to constitute interstate commerce, the decisions in the *Hooper* and *Nutting* cases, *supra*, have no bearing on the basic question in the case at bar, *i. e.*, whether State statutes can displace or materially modify the substantive general maritime law governing maritime contracts of marine insurance.

Petitioners' arguments based on the *Hooper* case thus are another example of the fallacy arising from their failure to differentiate between permissible State regulation of the business activities of marine insurance companies and the question as to what substantive law determines the rights and liabilities created by policies of marine insurance.

In summary, it is to be seen from the foregoing that the sole purpose of the McCarran Act was to preserve State statutes regulating and taxing the business of insurance from attack based on the ruling of this Court in the *S. E. U.* case that insurance constituted interstate commerce and that the Act was not intended to, and does not by its terms, augment the regulatory powers of the States and validate State laws which would previously have been, and still are, unconstitutional on other grounds.

In short, for the several reasons set forth above, the Court of Appeals was clearly right when it ruled herein that neither the McCarran Act nor the *Hooper* case, *supra*, has "application here" (R. 205).

POINT IV

The right of the respondent to have its liabilities determined according to the general maritime law is a constitutional right of which it may not be deprived by State law.

By its grant to the United States of judicial power over cases of admiralty and maritime jurisdiction in Article III, Sec. 2, of the Constitution, "the Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law." *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 160. In that case, this Court quoted from its former decision in *The Lottawanna,* 21 Wall. 558, 575, where this Court said:

> "'One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulations of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed.'" (*Ibid.* 161.)

The doctrine that the Constitution established the principles of the general maritime law operating uniformly in the whole country as the law of the land, not subject to regulation or modification by the States, has been the uniform holding of this Court. *Southern Pac. Co.* v. *Jensen,* 244 U. S. 205; *Chelentis* v. *Luck-*

enbach S. S. Co., 247 U. S. 372; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259; *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U. S. 21, 43; *O'Donnell* v. *Great Lakes D. & D. Co.*, 318 U. S. 36, 40; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409-10.

In *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244, n. 10, this Court said:

> "Disagreement over the Constitutional issues of the cases in the Jensen line has not extended to this principle. *Cf. The Lottawanna*, 21 Wall. 558, 575; *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U. S. 21, 43."

Since the policy of marine insurance here involved is a maritime contract deriving its force and effect from the general maritime law, the respondent has a constitutional right to have the substantive rights and liabilities existing between the parties to such contract determined according to the general maritime law.

Any State statute depriving a party of, or in any way infringing upon, such constitutional right is invalid under Art. VI, Sec. 2, of the Constitution which provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; * * * anything in the Constitution or laws of any State to the contrary notwithstanding."

In *Insurance Co.* v. *Morse*, 20 Wall. (87 U. S.) 445, the question involved was the constitutionality of a Wisconsin statute which required foreign insurance companies, as a condition precedent to being admitted

to do business in that State, to file an agreement not to remove to the Federal courts any suit brought against it in the courts of the State. This Court held at p. 458 that Art. III, Sec. 2, of the Constitution "secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal Court" and that the "Statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void". This has been the uniform holding of this Court. *Barron* v. *Burnside*, 121 U. S. 186, 197-9, 200; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207-8; *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532. See also, *inter alia*, *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 507-8, 514, 517. This Court there stated the controlling rule to be that (p. 514) "while a State may forbid a foreign corporation to do business within its jurisdiction, or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights."

The same article and section of the Constitution which extended the judicial power of the United States to "controversies * * * between citizens of different States" extended that judicial power "to all cases of admiralty and maritime jurisdiction" which grant has been held to establish and create the entire body of the Federal general maritime law. It follows, we submit, that that grant "secures to citizens * * * an absolute right" to have their substantive rights and liabilities arising out of maritime contracts, including policies of marine insurance, which derive their validity and effect from the general maritime law, determined according to that law and that any State statute which obstructs or interferes with that right is therefore "repugnant to the Constitution" and is "illegal and void".

Manifestly, the foregoing point and the legal principles applicable thereto are wholly separate and distinct from the issue presented in *Watson* v. *Employers Liability Assur. Corp.* (202 F. (2d) 408, cert. granted 247 U. S. 958), now pending in this Court, in that the constitutional law point raised by the liability insurer in that case does not in any way involve Art. III, Sec. 2, but rests solely on the due process clause of the Fourteenth Amendment. It is also to be borne in mind that that case is a tort action in which third parties seek the benefit of a "direct action" statute whereas the case at bar is a contract action on a marine insurance policy wherein one of the parties to the contract, *i. e.*, the assured, seeks to have the *inter se* rights and liabilities created by that maritime contract determined by State law in displacement of the general maritime law from which the contract "derives all its material rules and incidents" (p. 31 of 11 Wall.). As shown above, parties to a maritime contract are vested under Art. VI, Sec. 2, with an absolute right to have their substantive, contractual rights thereunder determined by the uniform rules of the general maritime law adopted by the "admiralty and maritime" clause of Art III, Sec. 2, as "the supreme law of the land".

Conclusion

The policy of insurance here involved is a typical policy of marine insurance. It is a maritime contract based upon, and deriving its material incidents from, the general maritime law. The general maritime law was adopted and established as the law of the land by Art. III, Sec. 2, of the Constitution. Uniformity is one of its essential qualities. Marine insurance,

of all maritime contracts, is peculiarly dependent upon the uniform application of the principles of the general maritime law to the determination of substantive rights thereunder. That law is beyond the power of the States to modify or displace. Specifically, since policies of marine insurance sprang from, and involve fundamental principles of, the general maritime law, the substantive rights of the parties thereunder are not subject to modification or qualification by State statutes. The application of State statutes (such as the several statutes of Texas here relied upon by the petitioners) to the provisions of a policy of marine insurance in order to alter the effect given to such contract terms by well settled rules of the substantive law of marine insurance would constitute an unwarranted invasion of the field of the general maritime law. It would also be a denial of a marine insurer's constitutional right under Art. VI, Sec. 2, to have its obligations to its assured under such maritime contract determined according to the general maritime law as adopted in this country. Petitioners' election of a common law remedy to enforce their rights under this maritime contract, on which an action in admiralty could have been filed, does not affect the applicability of the foregoing principles.

The McCarran Act does not authorize such invasion of the field of maritime law governing marine insurance contracts nor protect State statutes from invalidity under Art. III, Sec. 2, of the Constitution. That Act only protects State statutes, "enacted * * * for the purpose of regulating the business of insurance or which imposes a fee or tax on such business", from invalidity under the Commerce Clause. It does not make constitutional statutes which would have been

unconstitutional prior to the decision of this Court in *U. S. v. South-Eastern Underwriters Assn.*, 322 U. S. 533.

For the foregoing reasons, the rulings of the lower Courts herein should be affirmed in all respects.

Respectfully submitted,

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New York City,
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